

**CENTRAL VALLEY FLOOD PROTECTION BOARD
JOINT POWERS AGENCY SUB-COMMITTEE MEETING
March 13, 2009**

Staff Report

Item

Consider the circumstances under which the Board will amend its standard permit to require JPA member agencies to hold the State harmless for injuries in contract, tort, and/or inverse condemnation flowing from the JPA's work.

Consider the circumstances under which the Central Valley Flood Protection Board (Board) will require individual members of a JPA to sign assurance agreements with the Board.

Background

Various sections of the Water Code require that where the State, acting through the Board, offers assurances to the U.S. Army Corps of Engineers (Corps) that it will operate and maintain a project and will indemnify the Corps for any losses or damages, the State shall obtain similar assurances from the local sponsor of the project. (See Wat. Code §12828.) In several instances, local agencies have entered a joint powers agreement and formed a regional flood control agency as a joint powers agency separate from the individual members. The joint powers agency has then applied for a permit from the Central Valley Flood Protection Board. The question has arisen whether the Board should require the individual members of the joint powers agency to execute the required assurance agreements, or whether an assurance agreement with the joint powers agency is sufficient.

At the Sub-Committee's first meeting, there was general agreement that where a joint powers agreement provides that the obligations of the JPA will not be those of the members, the individual members will not be liable for the contractual obligations of the JPA or inverse condemnation liabilities during the existence of the JPA. Tort obligations of the JPA are obligations of the members due to Government Code section 895.2.

Following dissolution of a JPA, its members do not become liable for the contractual obligations of the JPA, although they probably remain liable for torts of the JPA or an individual member. It is not certain how the courts would treat inverse condemnation liability after the dissolution of the JPA.

Thus, in determining the desirability of permit conditions or assurance agreements involving the individual members, the Board needs to address two time periods: during the existence of the JPA, and after its dissolution.

Discussion

A. Permit Terms

The first approach to requiring indemnity from individual JPA members might involve amending the Board's standard permit term to require JPA members to hold the State harmless. This would likely require making the individual members co-permittees, so that they would be bound by the permit terms. As explained below, this has not been the Board's approach.

The Board's regulations provide that any Board permit may include and be subject to such reasonable conditions as deemed appropriate by the Board. (23 C.C.R. 16(a).) The regulations provide for indemnity in section 16(j), which provides in part:

The permit may require the permittee to be responsible for all personal liability and property damage which may arise out of permittee's actions or failure to perform the obligations of the permit. The permittee shall agree to save and hold the State free and harmless from, and to defend and indemnify the State against, any and all claims and liability, including but not limited to, personal injury or property damage arising or claimed to arise, directly or indirectly, from the uses of land pursuant to the permit. . . .

This section, and the provisions of the Water Code regarding indemnity, are implemented via Standard Condition 10 of the permit, which provides in part:

If any claim of liability is made against the State of California, or any departments thereof, the United States of America, a local district or other maintaining agencies and the officers, agents or employees thereof, the permittee shall defend and shall hold each of them harmless from each claim.

In those cases where the Board has determined it to be desirable to obtain an indemnity agreement with the individual members of a JPA, it has not amended Standard Condition 10, which continues to apply to the permittee/JPA, but has inserted a special condition in the permit requiring an assurance agreement satisfactory to the Board signed by the JPA and its individual members. For example, special condition thirteen of the TRLIA permit 18227 BD provides:

No construction under Part B shall occur until a Cooperation Agreement for the Project that provides local assurances to operate and maintain the completed project and to hold harmless and indemnify the Board and the State of California satisfactory to the Board, is executed among the Board, Three Rivers Levee Improvement Authority, Reclamation District 784, and Yuba County.

Thus, the Board's prior approach was not to include the JPA's individual members on the permit, thus making them subject to Condition 10 directly, but to require, as

a condition of the permit, a satisfactory assurance agreement between the JPA and its members and the Board. In other words, in order for the permit to be valid, the permittee/JPA must persuade its individual members to execute the assurance agreement. This results in a separate, clear agreement executed by the individual members.

B. Assurance Agreements.

The approach used by the Board in the past has been to require assurance agreements with the individual JPA members as a condition of the permit. The assurance agreements are then separate agreements, formally executed by the pertinent JPA members. At the first subcommittee meeting, there seemed to be agreement that the JPA member responsible for O&M activities should sign the assurance agreement to agree to provide O&M and to offer to hold the State harmless from consequences of improper O&M. Here we are addressing the question of more general indemnity. The question is under what circumstances, if any, should the Board require some or all of the individual members to sign assurance agreements with the Board.

Some arguments in favor and opposed to each of the potential answers to this question are as follows:

a. Under all circumstances.

The arguments in favor of requiring member agencies to sign an assurance agreement in all circumstances include (1) if the JPA does not have the financial resources to carry out its obligations under its agreement with the Board, its agreement to do so offers the State no real assurance that those obligations will be met; (2) if the JPA were to go out of existence, there would no longer be any local agency obligated to provide indemnity to the State and the United States; (3) the member agencies are often the proponents and beneficiaries of the project.

Arguments against requiring member agencies to sign an assurance agreement in all circumstances include: (1) the individual members of the JPA may also have limited resources, so their ability to hold the State and federal governments harmless in the event of a flood disaster is limited; (2) the individual members may not be able to obtain insurance; (3) in agencies with a large geographic reach, a particular project in one area of the agency may not benefit members located in another area; (4) the individual members may refuse to sign the assurance agreement; (5) requiring assurance agreements from the individual members may discourage them from forming JPAs and taking the lead on local flood management projects, (although the desire to protect their residents should still be an incentive to undertake necessary projects).

b. Under no Circumstances.

The argument for requiring such assurance agreements under no circumstances is that the JPA is designed to protect the individual members from liability, much as a corporation protects its shareholders. The JPA is a separate legal entity with its own obligations, liabilities and assets.

The argument against never requiring assurance agreements is that the State receives no reliable assurance if the JPA is incapable, insolvent, or goes out of existence.

c. In circumstances which suggest that it is appropriate.

It may be appropriate to consider the circumstances. For example:

1. **Provisions that require the JPA to meet its obligations before dissolution.** Some JPAs have provisions in their JPA agreement providing that the JPA must meet all its obligations before it goes out of existence. If such a JPA's assurance agreement with the State is considered an obligation, the JPA will not be able to dissolve and fail to meet those obligations (although it may still lack the resources to meet them). Alternatively, the member agencies could amend their JPA agreement to assume the obligations of the JPA's assurance agreement with the State in the event the JPA were dissolved. The State would want some assurance that those terms of the JPA agreement will not be changed at a later date.

In the absence of such a term in the JPA agreement, the Board might wish the member agencies to sign an assurance agreement providing that they would assume the obligations of the agreement in the event of the dissolution (or insolvency) of the JPA.

2. **Responsibility for the Project.** Where the JPA is responsible for the design and construction of the project, it is reasonable for the JPA and its members, who created the JPA and benefit from the project, to hold the State harmless from liability which flows from the design or construction.
3. **Prior Relationship with the Board.** Just as an agency looks at the history of performance when it awards a contract to a contractor, the Board could look at the history of the JPA's performance. Has it performed well? Have there been problems? Have there been instances of non-compliance with prior permits?
4. **Apparent ability to raise necessary funds to pursue the project to completion in a satisfactory manner.** If the JPA appears to have

insufficient capital and/or ability to raise funds, the Board would be more likely to look to the real beneficiaries of the project, the member agencies.

5. **History.** Has the JPA been in existence a long time? Has it completed several projects successfully? Is it established by statute or only by agreement among the members? Alternatively, is the JPA new? Is it expected to terminate once the construction is complete?
6. **Ability to obtain insurance.** Would the member agencies be able to obtain meaningful amounts of insurance on their own?
7. **Geographical considerations.** Where a JPA extends over a large geographical region, it may make sense to require the assurance agreement only from those member agencies who are involved in, and are beneficiaries of, the project.